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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 957

SAMUEL H. WISSNER,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Carl L. Shipley and Rufus W. Peckham, Jr., attorneys for Samuel H. Wissner, petitioner herein, respectfully request in his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled case.

OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered in the United States Court of Claims is No. 143-65, decided July 15, 1966, and is set out *infra*, in the appendix hereto at page 11. Motion for rehearing was denied October 14, 1966.

JURISDICTION

As grounds on which to invoke jurisdiction of this Court, petitioner relies upon Title 28 U.S. Code Section 1255, and alleges and verily believes that the special and important reasons justifying a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 are:

The opinion of the court below decides important questions of federal law which have not been, but should be, settled by this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Were petitioner's constitutional rights violated by the unconsented monitoring and recording of his private telephone conversations by agents of the Federal Bureau of Investigation?

2. Was it error for the court below to refuse to consider the petitioner's allegation of entrapment in regards to the evidence introduced to sustain charges against him?

3. Was petitioner's discharge from his employment invalid due to respondent's use of procedures which denied him his right to confrontation of his accusers?

STATUTES AND/OR REGULATIONS INVOLVED

Federal Communications Act, 47 USC Sec. 605 (Unauthorized publication or use of communications) in pertinent part:

> "No person receiving . . . any interstate or foreign communication by wire . . . shall divulge or publish . . . the contents thereof . . . to any person other than the addressee. . . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . . and no person having received (an) intercepted communication . . . shall divulge . . . the contents . . .

thereof, or use the same or any information therein contained for . . . the benefit of another not entitled thereto."

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . "

Amendment 5

"No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

Amendment 6

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

STATEMENT

Petitioner, a veteran's preference eligible, was employed as a Contract Specialist, GS-11, by the New York Procurement District, Department of the Army, in New York City. On December 27, 1962, petitioner was given a 30-day advance notice of proposed removal by the Department of the Army alleging, *inter alia*, that he "solicited and accepted gifts, favors, and gratuities and entertainment from the contractor which at the time thereof, was engaged in procurement activities and transactions with the district". In accordance with established procedure, petitioner, on or about January 10, 1963, submitted a written reply to the New York Procurement District Office denying all of the charges against him. By a letter dated January 23, 1963, petitioner received notice that after due consideration it was felt that the charges against him had not been adequately refuted and that his discharge was to be effective January 27, 1963. Petitioner then elected to appeal this action to the Civil Service Commission, and on July 2, 1963 a hearing was held before the

appropriate Civil Service Commission Regional Office. At that hearing certain evidence was produced for use against him including, *inter alia,* affidavits and signed statements from several employees of the contractor from whom petitioner was alleged to have wrongfully solicited gifts, favors, gratuities, etc. The employees themselves were not present so it was not possible for petitioner's counsel to cross examine them. There was also produced in evidence against him certain reports of agents of the Federal Bureau of Investigation. These FBI reports were adduced as a result of the agents' listening in on an extension telephone in the contractor's office and recording the conversation wherein petitioner allegedly wrongfully solicited the said gifts, favors, etc. These FBI agents were not present at petitioner's hearing and hence could not be cross examined either. On September 13, 1963, the Appeals Examiner rendered his decision upholding action of the Department of the Army in removing petitioner from his position as of February 5, 1963, the date of the filing of petitioner's appeal.

Thereafter, on or about September 23, 1963, petitioner appealed from this decision to the Civil Service Board of Appeals and Review in Washington. Memoranda in the nature of briefs were exchanged between petitioner and respondent, and on January 15, 1964 petitioner was advised by the Board of Appeals and Review that the decision of the Regional Office was affirmed. On January 21, 1964, petitioner requested the Civil Service Commission to reopen his case but on March 4, 1964 the Commission declined to do so and further advised that petitioner's administrative remedies were thereby exhausted.

On May 3, 1965, petitioner filed a petition in the United States Court of Claims seeking judgment for the loss of pay and other emoluments of Federal Service occasioned by his removal. On July 15, 1966, that Court granted respondent's motion for summary judgment; denied petitioner's cross-motion for summary judgment, and on October 14, 1966, denied petitioner's motion for a rehearing. This appeal follows therefrom.

REASONS FOR GRANTING THE WRIT

It is not disputed that in the instant case certain telephone conversations to which the petitioner was a party were monitored and electronically recorded, without the consent or knowledge of the petitioner by agents of the Federal Bureau of Investigation. It is petitioner's contention that this action was a deprivation of his privilege against self-incrimination, an unwarranted invasion of petitioner's right of privacy, and constituted an unreasonable search and seizure within the meaning of the 4th Amendment of the U. S. Constitution as well as a violation of the Federal Communications Act (47 USC Sec. 605) which provides, *inter alia*,

> "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . . and no person having received (an) intercepted communication . . . shall divulge . . . the contents . . . thereof, or use the same or any information therein contained for . . . the benefit of another not entitled thereto."

It cannot be seriously questioned that these FBI agents did in fact communicate the subject matter of petitioner's private conversations to his superiors and that his dismissal followed directly therefrom.

Although it might be argued that petitioner was the initial receiver of the telephone calls in question hence not a "sender" within the meaning of the above cited statute, the Second Circuit Court of Appeals met this question with dispatch in the case of *United States v. Tone*, 329 F.2d 848 (1964), holding,

> "The word 'sender' as used in the statute (47 USC Sec. 605) providing that no person not authorized by the sender shall intercept any communication by wire includes *both* the caller *and receiver* in a telephone conversation." (emphasis supplied)

Petitioner urges this Court to adopt that Court's interpretation of the term "sender" in regards to the statute's applicability to the instant case.

The Court of Claims relied upon this Court's decision in *Rathbun v. United States*, 355 U.S. 107, for the proposition that monitoring a telephone conversation without consent or knowledge is not a violation of 47 U.S.C.A. 605. Petitioner submits that that case was wrongly decided by this Court and should be narrowly limited in its application to similar facts where one party to a telephone conversation consents to police interception under circumstances where a real and present physical danger to the consenting party is so substantial as to outweigh the constitutional policy against unlawful searches and seizures and in favor of the right of privacy and the privilege against self-incrimination. Clearly the *Rathbun* facts were exceptional, and the dissents of Mr. Justice Frankfurter and Mr. Justice Douglas in the *Rathbun* case reflect a more rational policy than that set out in the majority opinion. Petitioner respectfully requests the Court to reexamine the question in the light of intensified resort to "bugging", wire tapping, electronic eavesdropping, and the proliferating use of evidence acquired by Government officials by such means, as its basic *modus operandi* in conducting public business. In *Hoffa v. United States*, Nos. 32-35, Sup. Ct., dec. Dec. 12, 1966, this Court endorsed the principle that "a surreptitious invasion by a government agent" into the preparations for trial of a defendant is a Sixth Amendment violation, and approved the decision in *Coplon v. United States*, 191 F.2d 749, where the U. S. Court of Appeals held that a lawyer and his client have Fifth and Sixth Amendment rights "to talk together by telephone without their conversations being monitored by the prosecution through a secret mechanical device which they do not know is being used."

If the *Coplon* case reasoning is sound, why should it not apply to unconsented telephone monitoring in a Federal personnel case? In either situation the risk is the

same - a telephone extension, a "bug", a wire tap - none of these secret invasions of privacy would be used if consent could be obtained. Everyone who uses a phone knows he may be subjected to eavesdropping, and the exact method of the eavesdropper is not material. But this Court should assure both citizens and Government agents that evidence which is the product of eavesdropping is invalid for every purpose, civil or criminal, for privacy, self-incrimination and trespass reasons.

In its opinion (*infra*, pages 11-14) upholding the action of the Civil Service Board of Appeals and Review, the United States Court of Claims declined even to consider petitioner's allegation of entrapment as raised on page 3, paragraph 15(e) (*infra*, page 17) of his petition to that Court. It is respectfully submitted that this was prejudicial error and that this Court should adopt as part of the law of this case the dissenting opinions of Justices Roberts, Brandeis, and Stone in the case of *Sorrells v. United States* (287 U.S. 435, 53 S. Ct. 210) wherein they stated,

> "The violation of the principles of justice by the entrapment of the unwary into crimes should be dealt with by the Court no matter by whom *or at what stage of the proceedings* the facts are brought to its attention." (emphasis supplied)

It is petitioner's contention that failure of the Court of Claims to consider this grave question constituted a violation of due process of law as contemplated within the meaning of the 5th Amendment to the U. S. Constitution.

An even more serious question arises from the conduct of the hearing held before the Regional Office Appeals Examiner of the Civil Service Commission on July 2, 1963. At that hearing which was in effect a criminal trial with petitioner's livelihood hanging in the balance, petitioner was at no time confronted personally by any of the persons whose highly prejudicial affidavits were used as evidence against him. As set forth in *Watkins v. United States*, 354 U.S. 178 (1957),

> "The Bill of Rights is applicable . . . to all forms of governmental action."

That failure of the government to confront an accused with his accusers is a violation of the 6th Amendment cannot be seriously disputed. Indeed, "the primary objective of the confrontation clause of that amendment is to prevent depositions or *ex parte* affidavits being used against an accused in lieu of a personal examination and cross examination of the witnesses," *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074. This Court,

> "has always been zealous to protect from erosion the rights of confrontation and cross examination, as expressed in the 6th Amendment." *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400.

Justice Douglas recognized the problem in his concurring opinion in *Peters v. Hobby*, 349 U.S. 331:

> "Dr. Peters was condemned by faceless informers. . . . None of them had to submit to cross examination . . . So far as we . . . know . . . they may be psychopaths or venal people . . . who revel in being informers. Under cross examination their stories might disappear like bubbles . . . Confrontation and cross examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life."

Petitioner submits his dismissal was based on a similar caliber of evidence. Certainly the Government has the burden of adducing substantial evidence to support its administrative action. A lack of substantial evidence makes an administrative action arbitrary.

> "A finding without substantial evidence to support it - an arbitrary or capricious finding - does violence to the law". *Federal Radio Comm. v. Nelson Bros.*, 289 U.S. 266, 270.

Affidavits and extra-judicial statements, coupled with a lack of such guarantees as confrontation and cross-examination, reduces evidence to the level of total incompetency, and an administrative action based on such evidence cannot be other than arbitrary. The Government

cannot meet any reasonable burden of administrative proof in reliance on such evidence. Neither *Greene v. McElroy*, 360 U.S. 474 (1959), nor *Williams v. Zuckert*, 371 U.S. 531, change this rule. The dissent of Mr. Justices Douglas and Black in the latter case reflects the basic principles applicable to the instant case:

> "After . . . years of faithful government service, petitioner has been branded with a stigma and discharged on the strength of three affidavits. Though he asked that these affiants be produced at his hearing, none was called to confront him. . . We have heretofore analogized these administrative proceedings that cast the citizen into outer darkness to proceedings that 'involve the imposition of criminal sanctions'; and we have looked to 'deeply rooted . . principles of criminal laws for guidance . . .' The stigma now attached to him will follow him, whatever employment he seeks. The requirements of due process provided by the Fifth Amendment should protect him against this harsh result by giving him the same right to confront his accusers as he would have in a criminal trial".

In *Brookhart v. Jones*, 384 U.S. 1, No. 657, Sup. Ct.,, dec. April 16, 1966, this Court recognized that the Sixth Amendment right to confrontation and cross examination must be "actually" waived to be lost, and there is a presumption against the waiver of constitutional rights.

Respondent in the proceedings below urges that administrative hearings are not criminal prosecutions within the meaning of the 6th Amendment. While this may be technically true it cannot be seriously argued that the discharge of a federal employee for alleged criminal conduct is not tantamount to the imposition of a criminal penalty. In the case of *Morgan, et al. v. United States*, 304 U.S. 1, 19, this Court laid down the rule that,

> "In administrative proceedings of a quasi-judicial character, the liberty and property of the citizen must be protected by the rudimentary requirements of fair play."

This principle was repeated again in *Greene v. McElroy, supra*, wherein this Court stated that,

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process."

Petitioner urges this Court to adopt as law the dissenting opinions of Justices Douglas and Black in the case of *Williams v. Zuckert*, 371 U.S. 531, 83 S. Ct. 403, wherein they stated that,

> "At an administrative hearing arising out of the discharge of an employee of the Federal Government for misconduct involving charges of immorality, fundamental justice requires that there be a meticulous regard for the decencies of a fair trial."

CONCLUSION

WHEREFORE, the premises considered, petitioner submits that there are special and important reasons justifying grant of a writ of certiorari in this case.

Respectfully submitted,

Carl L. Shipley
Rufus W. Peckham, Jr.

APPENDIX

In the United States Court of Claims

No. 143–65

(Decided July 15, 1966)

SAMUEL H. WISSNER v. THE UNITED STATES

Carl L. Shipley, attorney of record, for plaintiff. *Samuel Resnicoff* and *Shipley, Akerman & Pickett*, of counsel.

Francis L. Nunn, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFF'S COUNTER-MOTION FOR SUMMARY JUDGMENT

PER CURIAM: Plaintiff, a veteran's preference eligible, seeks to recover back pay alleging a procedurally defective discharge from his GS–11 position, as a contract specialist, with the New York Procurement District, Department of the Army. That discharge was predicated upon allegations that plaintiff had solicited and accepted gifts, favors, gratuities, and entertainment from a Government contractor with whom he had official relations. The parties have filed cross-motions for summary judgment, and the case is ready for decision thereon.

In responding to defendant's motion for summary judgment and countermoving for summary judgment, the plaintiff states that he "accepts defendant's statement of facts in its motion for summary judgment, except to the extent modified by conflicting statements in plaintiff's petition herein." However, plaintiff does not advise us, nor does our examina-

tion of his petition disclose, just what "conflicting statements" in his petition are deemed material. Rather, in his brief plaintiff devotes his entire argument to the contention that his discharge was procedurally defective. We, therefore, treat the case as involving no issues of material fact and address ourselves exclusively to the procedure followed in effecting plaintiff's discharge.

With one exception, the procedures followed by the Army in removing plaintiff from his position, effective January 27, 1963, were properly conducted under appropriate regulations.[1] The final notice of removal advised him of his right to appeal to the Civil Service Commission, and he elected to do so. Thereafter, a hearing was scheduled before an Appeals Examiner of the Civil Service Commission for July 2, 1963. In the appeal, plaintiff was represented by counsel who was given full opportunity prior to the hearing to review the evidence upon which the Army had predicated plaintiff's removal. Essentially, this evidence consisted of affidavits and signed statements by several of the contractor's personnel, as well as the reports of investigating agents of the Federal Bureau of Investigation concerning their monitoring of certain telephone conversations between plaintiff and the president of the corporate contractor. They listened to the conversations over an extension telephone located in the office of the president.

In the course of the hearing, plaintiff testified at length on his own behalf, and two witnesses whom plaintiff's counsel had asked the Army to produce were also present and testified. In addition, plaintiff's attorney introduced into evidence a number of exhibits consisting of performance ratings and letters of recommendation from plaintiff's associates and fellow employees. So far as the record discloses, at no time has the plaintiff, or his attorney, made any effort to obtain the testimony of the FBI agents or any of the contractor's personnel, nor has plaintiff or his attorney ever requested the

[1] The exception was a procedural defect in the original notice of proposed suspension. However, this procedural defect was corrected by the Civil Service Commission's decision which, while sustaining the removal, canceled the suspension and ordered that plaintiff be retroactively restored to active duty up to the date of his removal. The fact that plaintiff's earlier suspension was found to be procedurally defective does not affect the validity of his subsequent removal. *Holtsman* v. *United States*, 143 Ct. Cl. 108, 163 F. Supp. 863 (1958).

Civil Service Commission, or the Army, to make these persons available for examination.

Nonetheless, the gravamen of his complaint in this court is that the Government failed to produce the witnesses and investigators whose statements and affidavits were the evidentiary basis for the Commission's determination, and he asserts that such lack of confrontation by his accusers constitutes a denial of due process. In several earlier cases, however, we have decided this very question adversely to discharged employees who could make no showing that they had made any kind of request, timely or otherwise, for the production of the adverse witnesses. See *Begendorf* v. *United States*, 169 Ct. Cl. 293, 340 F. 2d 362 (1965); *De Nigris* v. *United States*, 169 Ct. Cl. 619 (1965); *Kaers* v. *United States*, 175 Ct. Cl. —, (April 1966); *cf. Hanifan* v. *United States*, 173 Ct. Cl. —, 354 F. 2d. 358 (December 1965). In *Kaers*, we said:

> If plaintiff really wanted to cross-examine the affiants (which could be the only reason for their presence), he could have requested a continuance so he could produce the witnesses or have them produced by the agency. He did neither, and it seems that what plaintiff really wanted was the "exception" rather than the evidence cross-examination might have provided. Thus, we think plaintiff had a duty to then and there demand the production of the witnesses. He did not, and consequently we cannot now hold that his procedural rights have been violated. Slip op. p. 3

The other basic complaint of plaintiff here appears to be the contention that his constitutional rights were violated when the FBI agents monitored his telephone conversations without his consent or knowledge. However, we are of the opinion that this contention is disposed of adversely to plaintiff by the case of *Rathbun* v. *United States*, 355 U.S. 107 (1957) where the Supreme Court held that each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another person to overhear the conversation.

Plaintiff's cross-motion for summary judgment and his brief are premised solely on the contention of procedural error of which we can find none on this record. He does suggest in the opening sentence of his brief that there exist

"numerous and substantial issues of material facts as set forth in plaintiff's petition herein." However, from our examination of plaintiff's petition, we are unable to determine what factual material thus faces us. Certainly plaintiff has neither told us nor attempted to answer the contentions raised in defendant's motion and briefs.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's cross-motion is denied. Plaintiff's petition is dismissed.

IN THE
UNITED STATES COURT OF CLAIMS

No. 143-65

SAMUEL H. WISSNER,
221 Linden Boulevard,
Brooklyn 26, New York,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

PETITION

(Filed May 3, 1965)

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1. Prior to January 21, 1963 plaintiff was employed as a Contract Specialist, GS-11, by the Department of the Army, New York Procurement District, New York, N. Y.

2. Plaintiff is an honorably discharged veteran and is entitled to the benefits and protections of the Veterans Preference Laws.

3. Prior to January 21, 1963, plaintiff had over 20 years of satisfactory or better Federal service to his credit and had received numerous commendations for superior service.

4. On December 26, 1962, the employing agency issued its advance notice of proposed removal, charging plaintiff in five counts with "soliciting and accepting gifts, favors, gratuities and entertainment from a contractor."

5. Plaintiff replied in writing on or about January 10, 1963, substantially denying all of the charges and specifications.

6. On January 23, 1963, the employing agency issued its final decision in which it found that the charges had been sustained and in which it advised plaintiff that his removal would be effected on January 27, 1963.

7. Plaintiff's removal was effected on January 27, 1963.

8. Plaintiff appealed this removal action to the Second U. S. Civil Service Region on February 5, 1963, pursuant to Section 14 of the Veterans Preference Act.

9. After conducting an investigation, the Second Region scheduled a hearing on July 2, 1963.

10. In a decision dated September 17, 1963, the Second U. S. Civil Service Region affirmed the employing agency's decision to remove plaintiff.

11. Thereafter, plaintiff appealed further to the Board of Appeals and Review of the Civil Service Commission, which affirmed the decisions of the agency and Second Region on January 15, 1964.

12. Plaintiff requested reconsideration by the Civil Service Commission on January 21, 1964 pursuant to Section 22.504 of the Federal Personnel Manual.

13. In a letter dated March 4, 1964, the Commission declined to reopen the case.

14. Plaintiff has exhausted his administrative remedies.

15. Plaintiff's removal was procedurally defective and illegal in that:

(a) Substantially all of the evidence relied upon by the employing agency and the Civil Service Commission was illegally obtained in violation of the

Federal Communications Act, 47 USC Sec. 605, and applicable New York State laws;

(b) The employing agency failed to prove its case on the basis of reliable, probative and substantial evidence and relied instead upon affidavits, unsworn statements, hearsay declarations and speculative opinions;

(c) Plaintiff was denied an opportunity to confront and cross-examine his accusers;

(d) The employing agency, despite plaintiff's timely request therefor, failed and refused to produce the initial and supplementary vouchers which, on their face, would have shown the prejudicial motivation of Vector Engineering, Inc., the accusing firm and its witnesses;

(e) Certain of the evidence produced at the hearing before the Civil Service appeals examiner relating to the alleged delivery to and acceptance by plaintiff of liquor at the headquarters of the employing agency should have been suppressed in that it was developed through entrapment; and

(f) The Civil Service Commission failed in its statutory duty to investigate plaintiff's case fully in that it failed to show that two employees (one Darvassy and another whom plaintiff has never met) of Vector Engineering, Inc., the accusing firm, were either fired or ceased employment with said firm at about the same time as charges were filed against plaintiff. The investigation also failed to adduce an affidavit or testimony from one Zemel who was and is the comptroller of Vector Engineering, Inc., and who was present at the initial conference where the faulty or spurious vouchers were discussed.

16. Plaintiff's removal was arbitrary, capricious and so grossly erroneous as to imply bad faith in that

(a) the Civil Service Commission failed and refused to remand the case to the Appeals Examiner so as to permit plaintiff to require the attendance of adverse witnesses as required under the rule in *Williams v. Zuckert*, 371 U.S. 531, and

(b) the Civil Service Commission's Board of Appeals and Review failed and refused to remand the case to the Second Region on the basis of newly found evidence which materially affected the credibility of one of the main witnesses for the employing agency.

WHEREFORE plaintiff demands judgment for the loss of pay and other emoluments of Federal service occasioned by his illegal removal.

Respectfully submitted

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